(1)

91-185

No.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

UNITED STATES OF AMERICA

v.

MICHAEL S. ANTOON, M.D.

PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 13, 1991

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED BY RULING THAT THE CONSENT OF WITNESS DONALD MILLAR TO TAPE RECORD A CONVERSATION BETWEEN HE AND THE PETITIONER WAS NOT INVOLUNTARY.

LIST OF PARTIES

The parties involved in this appeal are:

Michael S. Antoon, Petitioner by Ambrose and Friedman, Leonard G. Ambrose III, Counsel for Petitioner; and United States of America, Respondent, by Thomas W. Corbett, Jr., United States Attorney for the Western District of Pennsylvania and Bonnie R. Schlueter, Assistant United States Attorney.

This case arises from an indictment which was returned in the Western District of Pennsylvania which originally named three co-defendants. Indicted with Michael S. Antoon were: John A. Bettor and Xavier W. Folino. Neither Bettor nor Folino are parties before this Court.

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The United States Court of Appeals for the Third Circuit rendered a decision and written opinion in this matter. The correct citation for that decision is United States of America v. Michael S. Antoon; John A. Bettor; Xavier W. Folino, d/b/a Fairview Pharmacy, No. 90-3739 (3rd Circuit May 13, 1991). (R. 16)

By order dated June 5, 1991 signed by the Honorable Robert E. Cowen, Circuit Judge of the United States Court of Appeals for the Third Circuit, the Petition for Rehearing filed by Michael S. Antoon was denied. (R. 38)

This case came before the United States Court of Appeals for the Third Circuit on Interlocutory Appeal by the United States of America pursuant to the provisions of 18 U.S.C. sec. 3731. The government appealed a decision of the United States District Court for the Western District of Pennsylvania, the Honorable Maurice B. Cohill, Chief Judge, presiding, dated October 22, 1990. (R. 1)

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Pennsylvania had jurisdiction over this criminal action by virtue of 28 U.S.C. sec. 3231. The United States District Court entered an Order suppressing evidence on October 22, 1990 from which the government took an appeal. The United States Court of Appeals for the Third Circuit exercised interlocutory appellate jurisdiction pursuant to 18 U.S.C. sec. 3731. By opinion and order dated May 13, 1991 the United States Court of Appeals for the Third Circuit reversed the suppression order of the United States District Court for

the Western District of Pennsylvania. (R. 17) Michael S. Antoon's Petition for Rehearing with suggestion of rehearing en banc was denied by Order of the United States Court of Appeals for the Third Circuit dated June 5, 1991. (R. 38)

Michael S. Antoon, petitioner herein seeks a Writ of Certiorari to this Court. This Court has jurisdiction to issue a Writ of Certiorari by virtue of 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application and interpretation of a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The specific statutory provision at issue is codified at 18 U.S.C. sec. 2511(2)(c). That section reads as follows:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. sec. 2511(2)(c)

STATEMENT OF THE CASE

On February 16, 1990 a grand jury sitting in the Western District of Pennsylvania, Erie Division, returned an indictment naming the petitioner, Michael S. Antoon and two others as defendants. The indictment contained 298 counts. Each of the three defendants are medical professionals. Antoon and John Bettor are physicians. Xavier Folino is a pharmacist. It is alleged that each of the three defendants conspired and violated federal narcotics laws. The crux of the government's allegations is that the defendants conspired to issue prescriptions for nonvalid medical reasons thereby obtaining and

distributing the prescription medications. Additionally, two parcels of real property owned by the petitioner, Michael S. Antoon, are subject to forfeiture claims at counts 297 and 298 of the indictment.

As the allegations contained in the indictment accused the defendants of violations of the federal narcotics laws, federal jurisdiction was premised upon 18 U.S.C. Sec. 3231.

Donald Millar is a certified paramedic employed by the Emergycare Ambulance Service in the City of Erie, Pennsylvania. He received his training and was certified in 1979. The

petitioner, Michael S. Antoon, (hereinafter Antoon) was the program coordinator of Millar's training.

Millar and Antoon became very friendly. They would see each other on professional and social occasions. They were very close friends.

Millar was approached sometime during the latter part of April of 1989 by Trooper Charles Lewis of the Pennsylvania State Police. The meeting lasted approximately one hour. During the meeting Trooper Lewis showed Millar copies of prescriptions which had been issued by Antoon. Lewis told Millar that the prescriptions were not written for a valid medical reason. In so

doing, Lewis instilled the fear of prosecution into Millar.

There was a subsequent meeting between Millar and Trooper Lewis along with other agents of the government. At the subsequent meeting the agents explained to Millar that he was facing criminal charges for conspiracy to possess and distribute controlled substances. In fact, there were three different occasions at which meetings occurred between Millar and agents of the government between May 2 and May 11, 1989. All of those meetings were in person. They occurred at various places, including a task force house and the FBI office.

During each of the meetings that occurred between Millar and the government agents, there was discussion regarding the prescriptions which had been issued to Millar. Each time the agents would strike fear in Millar by discussing his criminal exposure. There was also discussion between Millar and the agents regarding the impact that criminal accusations would have upon his job as a paramedic. As a result of the persistent pressure, Millar began to feel trapped.

Finally there was a meeting in the FBI office located in the courthouse in Erie, Pennsylvania. Present at that meeting were Millar, Trooper Lewis and

Agent Langer of the FBI. There were also additional agents, the names of whom Millar could not recall. Again, there was discussion about the criminal charges facing Millar. There was also discussion regarding the impact that criminal accusations would have upon Millar's employment as a paramedic. Millar felt pressured. He felt trapped. He was in a room with four agents of the government. They told him that he would not be charged. His understanding was that in order to avoid charges he would have to wear a wire and engage Antoon in conversations seeking to incriminate Antoon. Millar felt cornered. He felt he had no

alternative. Millar cared very deeply about Antoon. He had no motive to bring harm upon Antoon. The only reason he agreed to wear the wire was due to the pressure and artful coercion employed by the government agents. In his own words, Millar was being "squeezed" by the government agents. (R. 24-25)

On May 11, 1989 the agents fitted a Nagra body recording device upon Millar and sent him to engage Antoon in conversation. The agents instructed Millar to secure inculpatory admissions from Antoon. The agents designed the agenda that Millar was to follow regarding his conversation with Antoon.

Millar told Antoon during the conversation that the fear and pressure

he was experiencing was burning a hole in his stomach. Millar told Antoon that he had been threatened with prosecution of conspiracy and perjury. Millar also indicated that the agents had accused him of selling drugs which had been acquired by Millar by way of prescription from Antoon.

During the conversation certain references were made by Antoon which have a tendency to inculpate him regarding the allegations contained in the indictment.

Unsatisfied with just a single conversation, the agents pressed Millar into attempting subsequent conversations

with the defendant. Those subsequent attempts were done at the insistence of the agents. The subsequent attempts to contact Antoon by Millar were both telephonic and in person. They proved unsuccessful. When the subsequent attempts to reach Antoon were not successful, Millar experienced a sense of relief. He was relieved because he did not want to do anything to hurt his friend Michael Antoon. Ultimately, he had agreed to engage Mike Antoon in recorded conversations because the agents made him feel that he had no choice. (R. 14)

An evidentiary hearing was held before the Honorable Maurice B. Cohill, Chief Judge of the United States

District Court for the Western District of Pennsylvania on October 22, 1990. After hearing the testimony of Millar, listening to arguments of counsel, and reviewing the applicable legal standard, Judge Cohill made a factual finding that Donald Millar's consent to wear the body recording device was involuntary. Judge Cohill found that Millar's consent to wear the body recording device was the result of a coercive overbearing of his will. He therefore suppressed the tape recorded evidence. (R. 15)

The government elected to take an interlocutory appeal. The issue was briefed by the parties before the United States Court of Appeals for the Third Circuit. Oral argument before a panel

of the United States Court of Appeals for the Third Circuit took place on April 9, 1991. In an opinion filed May 13, 1991 the United States Court of Appeals for the Third Circuit reversed the suppression order of Judge Cohill. In so doing the Third Circuit held that Judge Cohill's factual finding that Millar's consent was involuntary, was clearly erroneous. (R. 29)

Antoon filed a timely petition for rehearing with a suggestion of rehearing en banc. By Order dated June 5, 1991 the United States Court of Appeals for the Third Circuit denied Antoon's Petition for Rehearing with suggestion of rehearing en banc.

(R. 38) Antoon now comes before this Court seeking a Writ of Certiorari.

ARGUMENT

WHETHER THE CIRCUIT COURT ERRED BY RULING THAT THE CONSENT OF WITNESS DONALD MILLAR TO TAPE RECORD A CONVERSATION BETWEEN HE AND THE PETITIONER WAS NOT INVOLUNTARY.

The Court of Appeals substituted its factual findings for those of the District Court in the case at bar. This grossly exceeds proper appellate review under the clearly erroneous standard. There is a split of authority among the various circuit courts of appeals regarding the proper test of voluntariness of consent to tape record a conversation under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. sec. 2510 et

seq. This Court should grant certiorari so as to unify the law regarding the proper test of voluntariness of consent to tape record a conversation pursuant to 18 U.S.C. sec. 2511(2)(c).

This Court has previously decided that the introduction of tape recordings of private conversations at a criminal trial do not violate Fourth Amendment rights of the accused or constitutional or statutory privacy interests if one party to those conversations voluntarily consents to their recording. U.S. v. Caceres, 440 U.S. 741, 744, 99 S.Ct. 1465, 1467, 59 L.Ed2d 733 (1979), U.S. v. White, 401 U.S. 745, 750, 91 S.Ct. 1122, 1125, 28 L.Ed.2d 453 (1971). However, the review of constitutional

precedent regarding the voluntariness of consent is necessary in fashioning the appropriate test of voluntariness of consent to a tape recorded conversation. In U.S. v. Kelly, 708 F.2d 121, 125 (3rd Cir. 1983), the Court articulated the test to be employed to determine whether a person's consent to the tape recording of a conversation is voluntary. In so doing, the Court relied upon prior decisions of this Court wherein the voluntariness of consent was examined involving issues under the Fourth and Fifth Amendment to the United States Constitution. As the Court stated:

> "Determining whether a person's consent to the recording of a

phone conversation is 'voluntary' is not a simple task. See Culombe v. Connecticut, 367 U.S. 568, 604-05, 81 S.Ct. 1860, 1880, 6L.Ed2d 1037 (1961)(Opinion of Frankfurter, J.). It is a question of fact, which the Court must determine from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed2d 854 (1973); U.S. v. Sanford, 673 F.2d 1070, 1072 (9th Cir. 1982); U.S. v. Brandon, 633 F.2d 773, 776 (9th Cir. 1980). Consent to a wire tap is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force. Schneckloth, 412 U.S. at 228, 93 S.Ct. at 2048; Osser, 483 F.2d at 730. An individual's decision to allow the police to record a phone conversation, however, is not necessarily involuntary just because that individual's motives were self-seeking or because he harbored expectations of personal benefit. Moskow, 588 F.2d at 891; Osser, 483 F.2d at 730. Rather consent will be considered voluntary if, from the totality of the circumstances, the trial

> court determines that the party agreeing to a wire tap did so consciously, freely, and independently and not as a result of coercive overbearing of his will. " Kelly, 708 F.2d at 125.

The Third Circuit is joined by the United States Court of Appeals for the Ninth Circuit in conducting a totality of the circumstances analysis to determine the voluntariness of consent. See U.S. v. Ryan, 548 F.2d 782, 791 (9th Cir. 1976), U.S. v. Sanford, 673 F.2d 1070, 1072 (9th Cir. 1982).

The United States Court of Appeals for the Second Circuit leads those Courts of Appeals which adhere to a different test of voluntariness of

consent to the tape recording of conversations. The Second Circuit announced its standard in U.S. v. Bonanno, 487 F.2d 654, 658-59 (2nd Cir. 1973). In announcing the opinion of the Court, Judge Friendly stated:

> "An informer's consent to the monitoring or recording of telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided sometime previously and entails no unpleasant consequences to him. Hence, it will normally suffice for the government to show that the informer went ahead with a call after knowing what the law enforcement officers were about." 487 F.2d at 658-59.

This less stringent analysis has been reaffirmed in the Second Circuit. See

U.S. v. Amen, 831 F.2d 373, 378 (2nd Cir. 1987), U.S. v. Barone, 913 F.2d 46, 49 (2nd Cir. 1990).

The standard set forth in Bonanno, supra, or one substantially similar to it, has been adopted by other circuit courts. In U.S. v. Jones, 839 F.2d 1041 (5th Cir. 1988), the court stated:

> "Although the burden is on the government to prove consent, in most cases we find voluntariness where 'the informant placed a telephone call knowing that it would be monitored.' U.S. v. Kolodziej, 706 F.2d 590, 593 (5th Cir. 1983)." Jones, 839 F.2d at 1050.

The United States Court of Appeals for the Seventh Circuit expressly adopted the standard announced by the Second Circuit in Bonanno,

supra. U.S. v. Horton, 601 F.2d 319, 323 (7th Cir. 1979), rehearing denied (August 27, 1979), cert. denied, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed2d 197 (1979).

Clearly the standards by which the voluntariness of consent to a tape recorded conversation under 18 U.S.C. sec. 2511(2)(c) are judged differ depending upon the circuit court conducting the scrutiny. In fact, the United States Court of Appeals for the Third Circuit expressly rejected the Second Circuit test of voluntariness. In so doing the Court stated:

> "We reject the government's argument that the Second Circuit's decision in U.S. v. Bonanno, 487 F.2d 654 (2nd Cir. 1973), requires us to apply a

> different test for determining whether an informer consented to the monitoring or recording of a telephone call. The government contends that Bonanno holds that a district court, when determining voluntariness, should only examine whether an informant went ahead with a phone call knowing that it was being recorded by the police. We disagree. We read Judge Friendly's decision as merely recognizing that the factual issue of consent is slightly different in cases where the defendant's consent to a physical search is at issue. In those cases the trial court has to determine whether the defendant voluntarily consented to a search contrary to his own interests, rather than whether an informer voluntarily consented to a decision 'which he has ordinarily decided sometime previously and which entails no unpleasant consequences.' Id. at 658." Kelly, 708 F.2d at 125 n.5.

The standard announced by the Third Circuit in Kelly, supra is the appropriate standard that should be used

in all federal courts. While it is true that consensual recordings under Title III do not raise constitutional concerns, there is no justification for employing a less stringent standard of voluntariness of consent. In a cogent and well reasoned dissenting opinion in U.S. v. Ryan, 548 F.2d 782, 792 (9th Cir. 1976), Judge Hufstedler joined by Judge Ely stated:

> "The District Court attempted to justify its conclusion that Mizera's consent was voluntary by suggesting that 'voluntariness' takes on a different meaning in the context of coerced confessions than it does in the context of consent to participation in monitoring or other activities protected by the Fourth Amendment. (Although the District Court found that the threatened denial of medical treatment was not coercive in the present case, it said that it

> would have 'great concern' if the case involved a confession or 'the waiver of a right associated with a fair trial.') This distinction in unfounded. Coercion does not evaporate with an assumed change in climate between the Fourth and Fifth Amendments. Nor does coercion become a free choice when it is applied to obtain consent rather than to force a confession." 548 F.2d at 794, Hufstedler, J. dissenting from denial of rehearing en banc.

This Court's totality of the circumstances analysis regarding the voluntariness of consent which was defined in Schneckloth v. Bustamonte, supra should be applied universally in the federal courts as the appropriate standard by which the voluntariness of consent to tape recorded conversations under 18 U.S.C. sec. 2511(2)(c) is analyzed.

In the case at bar the Circuit Court reviewed the transcript of the suppression hearing and substituted its factual findings for those of the District Court. This process of result-oriented analysis usurps the fact-finding function of the District Court and stands the clearly erroneous standard of review on its head. The District Court made a factual finding that Donald Millar's consent to the recording of his conversation with the defendant was not voluntary. (R. 15) That finding is deserving of the greatest respect and deference by the appellate court. The clearly erroneous standard of review allegedly employed by the Circuit Court in the case at bar was

correctly defined by the same court in Krasnov v. Dinan, 465 F.2d 1298, 1302 (3rd Cir. 1972). As the Court stated:

> "In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are left with a definite and firm conviction that a mistake has been committed (quoting Spire, Inc. v. Humble Oil and Refining Co., 403 F.2d 766, 770 (3rd Cir. 1968). It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may

> not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system, either by a American commonlaw tradition or by rule and statute." Krasnov v. Dinan, supra at 1302-1303.

The circuit court below expressly recognized that the clearly erroneous standard of review applied in the case at bar. Moreover, the circuit court below cited Krasnov v. Dinan, supra as correctly defining the clearly erroneous standard. (R. 23) As the Court below stated in the case at bar:

> "We must accord the District Court's conclusion that Millar's consent was involuntary great deference, unless our examination of the record shows that the District Court committed clear

> error. U.S. v. Hashagen, 816 F.2 899, 906 (3rd Cir. 1987). The District Court's conclusion will stand unless it '(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the support of evidentiary data.' Krasnov v. Dinan, 465 F.2d 1298, 1302 (3rd Cir. 1972)." U.S. v. Antoon, No. 90-3789, at p. 8 (3rd Cir. 1991) (R. 23).

After appropriately stating the correct standard of review, indeed defining the same, the Circuit Court ignored that standard and proceeded to make its own factual findings. This is precisely what the clearly erroneous standard of review is designed to prohibit.

There is very sound policy associated with the proper application

of the clearly erroneous standard. There is keen public interest in the stability and judicial economy that is promoted by recognition that the trial court and not the appellate tribunal should be the finder of fact. Permitting appellate courts to share more actively in the fact-finding function tends to undermine the legitimacy of the District Courts in the eyes of litigants. Appeals are multiplied since litigants are encouraged to retry the factual issues on appeal. It is a needless reallocation of judicial authority. See F.R.C.P., Rule 52(a), 42 U.S.C., official comment.

The suppression record indicated that Millar felt he was being "squeezed"

by the agents. (R. 24-25). During the several meetings that occurred between Millar and government agents there was always discussion regarding Millar's criminal exposure as well as the impact that criminal accusations would have upon his employment. (R. 13). There were multiple agents present during these meetings. (R. 14). Millar expressed that he did not wish to consent to the recording of his conversations with the defendant. (R. 14). This was a clear expression of Millar's true will. However, through the repetitive coercive tactics of the agents, Millar's will was overborne. His desire not to wear the recording

device was defeated by the pressure exerted upon him.

This Court should grant a Writ of Certiorari so as to reconcile the divergence of authority regarding the appropriate test of voluntariness of consent under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Additionally, this Court should grant a Writ of Certiorari so as to correct the inappropriate application of the clearly erroneous standard of review employed by the Circuit Court below.

CONCLUSION

The Petitioner, Michael S. Antoon, respectfully requests that this Honorable Court grant his Petition for Write of Certiorari so as to resolve the issues fairly raised herein.

Respectfully submitted,

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